

A **KOPERASI TELEKOM MALAYSIA BHD v.
ISMAIL NORDIN & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
ANAND PONNUDURAI JC
[SUIT NO: WA-22NCC-349-06-2019]

B 6 JANUARY 2020

C **CIVIL PROCEDURE:** *Striking out – Writ and statement of claim – Application for – Whether action abuse of court process – Whether registered cooperative society could seek redress in civil courts – Whether cooperative society ought to refer dispute to Cooperative Commission Malaysia – Co-operative Societies Act 1993, ss. 23, 82 – Rules of Court 2012, O. 18 r. 19(1)(d)*

D **UNINCORPORATED ASSOCIATIONS:** *Societies – Co-operative society – Whether registered cooperative society could seek redress in civil courts – Whether cooperative society ought to refer dispute to Cooperative Commission Malaysia – Co-operative Societies Act 1993, ss. 23, 82*

E The defendants, *vide* encl. 7, filed an application pursuant to O. 18 r. 19(1)(d) of the Rules of Court 2012 ('ROC') for the plaintiff's writ and statement of claim to be struck off on the basis that the plaintiff's action was an abuse of the process of the court. The plaintiff was a cooperative established under the Co-operative Societies Act 1948 (Co-Operative Societies Act 1993) under the Cooperative Commission Malaysia ('the Commission'). The first, second and third defendants ('D1, D2 and D3') were the former board members of the plaintiff. The fourth defendant ('D4') was a company whereby D1, D2 and D3 were the current directors and owned substantial amount of shares of D4. The plaintiff submitted that D1, D2 and D3 had caused the plaintiff to enter into a share sale agreement ('share sale agreement') with D4 which benefited the defendants personally. Pursuant to the share sale agreement thereto, D1, D2 and D3 had caused the plaintiff to make full payment of the share purchase price for the purchase of all of D4's shares whereby D1, D2 and D3 were appointed as the directors/shareholders of D4 and the properties were transferred into the name of D1, D2 and D3. These acts of the defendants were alleged to be contrary to the terms and conditions of the share sale agreement. Further, the acts of the defendants in registering their names as directors/shareholders of D4 also allegedly went against the directives by the Commission. It was the plaintiff's pleaded case that the cause of action against D1, D2 and D3 was for breach of fiduciary and statutory duties as former board members of the plaintiff which had caused the plaintiff's substantive losses and that D4 had further conspired with D1, D2 and D3 to execute these unlawful acts. The defendants, however, submitted that since the plaintiff was a registered cooperative society under the Co-operative Societies Act 1993 ('the said Act') and since the defendants were members and former office bearers of the plaintiff then, the plaintiff

could not seek redress in the civil courts unless the Commission referred the dispute to court under s. 82(3) of the said Act and this could only be achieved once the plaintiff referred such dispute to the Commission under s. 82(1) of the said Act. The defendants, in their submission, relied heavily on the Federal Court decision of *M Arulandan v. Malaysian Co-operative Insurance Society Ltd* ('*Arulandan*') to support their contention. Conversely, the plaintiff submitted that the case of *Arulandan* ought to be distinguished and that subsequent cases such as *Koperasi Serbausaha Makmur Bhd (KOSMA v. Jamil Ninggal & Ors* ('*Koperasi Serbausaha*') and *Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd* ('*Bank Kerjasama Rakyat*') ought to be followed whereby the plaintiff contended that on the facts of this matter and in light of the reliefs sought, the plaintiff's claim ought not to be struck off as s. 82 of the said Act was not applicable.

Held (dismissing encl. 7):

- (1) The civil court surely could not only have jurisdiction to hear a matter concerning a cooperative society only once the Commission requires the parties concerned to refer the dispute to court. Based on the nature of the plaintiff's claim and their various causes of action, and applying the principles as set out in the cases of *Koperasi Serbausaha* and *Bank Kerjasama Rakyat*, this court had no hesitation in dismissing the defendants' application to strike out the plaintiff's claim. (paras 35 & 36)
- (2) The facts of the present case were distinguishable from *Arulandan* as the reliefs sought herein did not relate to a disciplinary action against an employee. Further, bearing in mind that the causes of action related to breach of fiduciary/statutory duty, such claims could not be considered a dispute touching on the management or business of the plaintiff. Further, in relation to the specific prayers sought by the plaintiff in the action, this court agreed with the plaintiff that with reference to the powers and functions expressly set out in s. 23 of the said Act, the Commission had no power/jurisdiction to grant such injunctive relief or award damages etc. In the upshot, encl. 7 was dismissed. (paras 37-39)

Case(s) referred to:

- Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC (*refd*)
- Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd* [2019] 1 LNS 1099 HC (*foli*)
- Koperasi Serbausaha Makmur Bhd (KOSMA) v. Jamil Ninggal & Ors* [2019] 9 CLJ 600 CA (*foli*)
- M Arulandan v. Malaysian Co-operative Insurance Society Ltd* [1987] 1 CLJ 43; [1987] CLJ (Rep) 44 SC (*dist*)
- Madhava Rao v. Surya Rao* AIR 1954 Mad 103 (*refd*)
- On Bin Long & Ors v. Romeli Dollah* [2014] 7 CLJ 371 CA (*refd*)
- Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 FC (*refd*)
- Thanaraj Manikam & Ors v. Lower Perak Tamil Co-operative Society* [1996] 1 LNS 129 HC (*refd*)

A Legislation referred to:

Co-operative Societies Act 1948 (repealed), s. 49
Co-operative Societies Act 1993, ss. 23, 82(1), (3)
Co-operative Societies (Subsidiary) Regulations 2010, reg. 4(1)(d)
Federal Constitution, art. 121
Rules of Court 2012, O. 18 r. 19(1)(d)

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For the plaintiff - Syamsul Azhar Ab Aziz; M/s Putra Taulan & Faiq Azizan
For the defendants - Mahfuzah Mohd Faizi; M/s Nurhayati & Mahfuzah

Reported by Suhainah Wahiduddin

JUDGMENT

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Anand Ponnudurai JC:

Introduction

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[1] The defendants have *vide* encl. 7 filed an application pursuant to O. 18 r. 19(1)(d) of the Rules of Court 2012 (“ROC”) for the plaintiff’s writ and statement of claim dated 26 June 2019 to be struck off on the basis that the plaintiff’s action is an abuse of the process of court. The said application was supported by an affidavit affirmed by the third defendant (Ahmad Shamsuddin bin Ramli (No. K/P: 670111-08-5151) on 22 July 2019. A perusal of paras. 7, 8, 9 and 10 of the said affidavit will reveal that the basis of the application is as follows:

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7. Setelah dinasihati oleh peguamcara saya dan saya percaya ianya adalah benar bahawa tuntutan Plaintiff ini adalah terhalang oleh peruntukan-peruntukan Akta Koperasi 1993 sekaligus menjadikan ianya salah, tidak sempurna dan salah satu penyalahgunaan proses mahkamah dimana Plaintiff sepatutnya merujuk tindakan ini kepada Suruhanjaya Koperasi Malaysia dan bukannya di mahkamah sedia ada.
8. Saya seterusnya menyatakan bahawa Defendan Pertama, Defendan Kedua dan Defendan Ketiga (“Defendan-Defendan”) merupakan anggota Plaintiff dan bekas Lembaga Plaintiff yang merupakan sebuah koperasi, manakala Defendan Keempat terdiri dari Defendan-Defendan dan tuntutan yang dibawa oleh Plaintiff adalah terhadap bekas anggota dan bekas Lembaga di mana tuntutan tersebut adalah berkaitan pertikaian yang menyentuh perniagaan koperasi dan ianya jelas bahawa pertikaian ini jatuh dibawah seksyen 82 Akta Koperasi 1993.
9. Saya juga setelah dinasihati oleh peguamcara saya dan percaya ianya adalah benar bahawa Suruhanjaya Koperasi Malaysia (“Suruhanjaya”) adalah pihak yang seterusnya yang akan menentukan sama ada pertikaian tersebut akan diputuskan sendiri oleh Suruhanjaya, akan dirujuk kepada penimbangtara, tribunal Koperasi atau Mahkamah.

10. Saya percaya bahawa sehingga kini Plaintiff tidak pernah merujukkan pertikaian yang dituntut ini kepada Suruhanjaya seperti yang diperuntukkan di dalam Akta Koperasi 1993 dan oleh yang demikian saya menyatakan bahawa tuntutan ini adalah pra-matang dan tidak mengikut peruntukan undang-undang sedia ada. A
- [2] The plaintiff *vide* their affidavit in reply affirmed by Hashim bin Hussein affirmed on 23 August 2019 (encl. 12) resists the defendants' application and avers as follows at paras. 19 to 23 of the affidavit as follows: B
19. Atas dasar dan fakta-fakta di atas ini saya sesungguhnya menafikan keseluruhan perenggan 7 hingga 9 Afidavit Sokongan Defendan-defendan dan dinasihati serta percaya dan menyatakan bahawa kausa tindakan Plaintiff terhadap Defendan-defendan adalah bagi isu frod, pelanggaran tanggungjawab fidusiari dan statutory oleh D1, D2, dan D3 dan langsung bukan merupakan isu perniagaan Plaintiff – maka tidak perlu suatu rujukan kepada Suruhanjaya Koperasi Malaysia. C
20. Saya juga sesungguhnya dinasihati dan percaya bahawa pertikaian yang perlu dirujuk kepada Suruhanjaya Koperasi Malaysia hanyalah melibatkan: D
- (i) pertikaian di antara anggota, bekas anggota dan orang yang menuntut melalui anggota, bekas anggota dan anggota yang mati; E
- (ii) antara seseorang anggota, bekas anggota dan orang yang menuntut melalui anggota, bekas anggota dan anggota yang mati dengan koperasi itu, Lembaganya, atau mana-mana pegawai koperasi itu;
- (iii) anggota koperasi itu atau lembaganya dengan mana-mana pegawai koperasi itu; dan F
- (iv) antara koperasi itu dengan mana-mana koperasi lain.
21. Saya juga dinasihati dan sesungguhnya percaya dan dinasihati bahawa 'perniagaan' sepertimana dimaksudkan di dalam Seksyen 82 Akta Koperasi 1993 berkenaan adalah apa-apa 'hutang atau tuntutan yang kena dibayar' atau (debt or demand due) oleh ahli atau bekas ahli – yang mana adalah tidak termasuk bagi pelanggaran fidusiari dan statutory oleh D1, D2 dan D3 di sini sebagai bekas ahli Lembaga Plaintiff G
22. Maka, atas alasan-alasan di atas ini, saya dengan ini sesungguhnya menafikan keseluruhan perenggan 11 hingga 13 Afidavit Sokongan Defendan-defendan dan menyatakan serta menegaskan bahawa tidak wujud keperluan untuk merujuk pertikaian bagi kausa tindakan pelanggaran tanggungjawab fidusiari dan statutory kepada Suruhanjaya Koperasi Malaysia. H
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- A 23. Saya dengan ini dinasihati dan sesungguhnya percaya bahawa Mahkamah Yang Mulia ini mempunyai bidangkuasa untuk mendengar tuntutan Writ Saman dan Pernyataan Tuntutan oleh Plaintiff di sini memandangkan tidak wujud sebarang keperluan oleh Plaintiff untuk merujuk pertikaian ini kepada Suruhanjaya Koperasi Malaysia di mana kausa tindakan Plaintiff terhadap Defendan-defendan adalah bagi isu frod, pelanggaran tanggungjawab fidusiari dan statutory oleh D1, D2 dan D3 dan langsung bukan merupakan isu perniagaan Plaintiff.
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[3] From the above, it will immediately become apparent what the issue is ie, should the plaintiff have resorted to s. 82 of the Co-operative Societies Act 1993 (“the said Act”) and referred this dispute to the Commission for a decision? For ease of reference, s. 82 of the said Act provides as follows:

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82. Settlement of disputes

- (1) If a dispute touching the constitution, by-laws, election of officers, conduct of general meetings, management or business of a co-operative society arises:-
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- (a) among members, past members and persons claiming through members, past members and deceased members;
- (b) between a member, past member, or person claiming through a member, past member or deceased member, and the co-operative society, its Board, or any officer of the co-operative society;
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- (c) between the co-operative society or its Board and any officer of the co-operative society; or
- (d) between the co-operative society and any other co-operative society,
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such dispute shall be referred to the Commission for decision.

- (2) A claim by a co-operative society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member shall be deemed to be a dispute touching the business of the co-operative society within the meaning of subsection (1).
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- (3) The Commission may, on receipt of a reference under subsection (1):
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- (a) decide the dispute by itself;
- (b) refer the dispute to an arbitrator or arbitrators for disposal;
- (ba) refer the dispute to the tribunal established under section 83; or
- (c) require the parties concerned to refer the dispute to a court.
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The Pleadings And Prayers Sought

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[4] In order to arrive at a decision on this application, it would be imperative to set out the background of the parties as well as the gist of the plaintiff's claim and the prayers sought. The plaintiff's case can be summarised as follows:

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(i) The plaintiff is a co-operative established under the Co-operative Societies Act 1948 (Co-operative Societies Act 1993) under the Co-operative Commission Malaysia.

(ii) The first, second and third defendants ("D1, D2 and D3") were the former Board members of the plaintiff whereby:

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(a) D1 was the Chairman from 1990's until 19 April 2017.

(b) D2 was the Secretary from 1980's until 19 April 2017.

(c) D3 was the Treasurer from 2003 until 19 April 2017.

(iii) It is the plaintiff's case that at all material time, D1, D2 and D3 had full leadership and decision-making control over the plaintiff.

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(iv) The fourth defendant ("D4") is a company limited by shares (a Sdn Bhd company) whereby:

(a) D1 is the current Director and owner of 782 shares of D4;

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(b) D2 is the current Director and owner of 759 shares of D4; and

(c) D3 is the current Director and owner of 759 shares of D4.

(v) D4 is currently a dormant company.

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(vi) The plaintiff was registered and established on 21 July 1922 with its main purposes for establishment is to conduct any (authorised) business(es) for the sole benefit of benefiting/bringing profits to its members/shareholders.

(vii) It is the plaintiff's case that D1, D2 and D3 being the Board members of the plaintiff has the fiduciary and statutory duties to be prudent and diligent in carrying out the plaintiff's business(es) and activities.

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(viii) Further, it is also the plaintiff's case that D1, D2 and D3 being the then Chairman, Secretary and Treasurer of the plaintiff, have specific responsibilities and liabilities as provided, amongst others under s. 47, s. 48 and s. 49 of the Cooperative Societies By-Laws.

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B. Particulars of breach(es) by the defendants which gave rise to the plaintiff's claims herein.

(a) D1, D2 and D3 had caused the plaintiff to enter into a share sale agreement with D4 which benefited the defendants personally

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- A (ix) It is the plaintiff's pleaded case that on 30 June 2015, D1 and D3 had caused the plaintiff to enter into a share sale agreement with D4 ("share sale agreement") with the following salient terms and conditions (where applicable):
- B (a) The purchase price was RM6,826,006.80;
- B (b) The purchase price shall be calculated based on the acreage of several pieces of land owned by D4 at the rate of RM8.90/sq ft (for all the said lands) as follows:
- C (1) Lot No. 32168 held under Geran No. PN31947;
- C (2) Lot No. 32169 held under Geran. No. PN31948; and
- C (3) Lot No. 32170 held under Geran No. PN39150
- all situated at Mukim Rasah, Daerah Seremban, Negeri Sembilan ("the properties");
- D (x) The share sale agreement was executed by D1, D2 and D3 on behalf of the plaintiff.
- (xi) D1, D2 and D3 at all material time had full and total control over the transactions pursuant to the share sale agreement including the payment methods, preparation of the agreement and transfer documents (transfer of properties and transfer of shares) and other incidental matters thereto.
- E (xii) Pursuant to the share sale agreement thereto, D1, D2 and D3 had caused plaintiff to make full payment of the share purchase price for the purchase of all of D4's shares, whereby:
- F (a) D1, D2 and D3 were appointed as the directors/shareholders of D4; and
- (b) The properties were transferred into the name of D1, D2 and D3 as the registered proprietors.
- G These acts of the defendants were contrary to the terms and conditions of the share sale agreement.
- H (xiii) The plaintiff's other Board members and its shareholders/ordinary members never approved nor authorised D1, D2 and D3 to hold the shares of D4 and to become the directors therein.
- (xiv) The plaintiff's other Board members and its shareholders/ordinary members also never approved nor authorised D1, D2 and D3 to be registered as the proprietors of the properties.
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- (xv) Further to the above, the acts of the defendants in registering their names as directors/shareholders of D4 went against the directives by the Co-operative Commission Malaysia which served a letter in November 2016 directing for the plaintiff to (where applicable):
- (a) resubmit the co-operative transfer application(s) to convert the existing function (credit) to the service function by making investment a primary activity to enable the cooperative to obtain a higher percentage of investment from the Cooperative fund for the benefit of long term investment; B
 - (b) ensures the establishment of subsidiaries is in compliance with GP17: Guidelines for Forming, Owning, Acquiring or Establishing Subsidiaries; C
 - (c) Ensure the proposed establishment of a subsidiary is approved at the Annual General Meeting of the Cooperative;
 - (d) Ensure the scope and limits of the Cooperative's investment in the paid-up capital of the subsidiary are approved by the Annual General Meeting of the Cooperative and Cooperative Board Member Meeting; D
 - (e) Appointment of members of the board of directors as provided under para. 4(1)(d) of the Co-operative Societies (Subsidiary) Regulations 2010 which shall consist of the following members: E
 - (1) not more than one-third of the members of the Co-operative Board; and
 - (2) members appointed from among non-members of the Co-operative Board; and F
 - (f) To ensure that the percentage of shareholdings in the subsidiary is in the name of the co-operative company as prescribed under the Companies Act 1965; G
- (xvi) Even after the registration of shares of D4 in the names of D1, D2 and D3 (and not plaintiff) – all the defendants never declared nor informed the plaintiff of their shareholdings and directorship in D4. G
- (xvii) To this date, D4's shares had not been transferred to the plaintiff's name nor any of its nominees/subsidiaries. H
- (xviii) The plaintiff further alleged as follows:
- (a) D2 and D3 failed to take into account and the business risks involved, in that the properties were 'leasehold' properties and were Malay Reserved Land which is incapable of being transferred to the plaintiff. I

- A (b) All the defendants had caused the plaintiff to enter a housing development project over the properties whereby the plaintiff was made to fork out another RM2,000,000 to D4 (where D1, D2 and D3 are the directors/shareholders of D4) as ‘wang permulaan’ to develop the properties
- B (c) Plaintiff had paid a total sum of RM1,500,000 for the purchase of a property under Hakmilik GM 307, RTP Ulu Mantau 1, Mukim Rasah, Seremban Negeri Sembilan (“property 3299”) however property 3299 was transferred to D1 instead of plaintiff.
- C (xix) To summarise, it is the plaintiff’s pleaded case that the cause of action against D1, D2 and D3 is for breach of fiduciary and statutory duties as former Board members of the plaintiff which had caused the plaintiff’s substantive loss(es); and whereby D4 further conspired with the D1, D2 and D3 to execute these unlawful acts.
- D [5] Specifically, the plaintiff in their statement of claim seeks the following orders:
- E (a) A Declaration that the Defendants are trustees of the Properties held under Lot No. 32168 under Grant No. PN31947, Lot No. 32169 under Grant No. PN31948 and Lot No. 32170 under Grant No. PN39150, which all of the said Properties are in Mukim Rasah, Seremban District, Negeri Sembilan (“said Properties”) on behalf of the Plaintiff.;
- F (b) A Declaration that D1 is a trustee of Property held under Lot No. 3299 under the Title of GM 307, RTP Ulu Mantau 1, Mukim Rasah, Seremban, Negeri Sembilan (“Property 3299”) on behalf of the Plaintiff;
- G (c) A mandatory injunction to prevent Defendants either by himself and/or his agents and/or others from disposing of or charging of or transferring or mortgaging or transacting or taking any steps to assist in the disposition or charging of or transferring or mortgaging or otherwise trading or taking any steps to assist in any disposal, lease, charging, transfer or other dealings with such Properties;
- H (d) A mandatory injunction to prevent Defendants either by himself and/or his agents and/or others from disposing of or charging of or transferring or mortgaging or transacting or taking any steps to assist in the disposition or charging of or transferring or mortgaging or otherwise trading or taking any steps to assist in any disposal, lease, charging, transfer or other dealings with the entire shareholding or any shares of D4;

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- (e) A mandatory injunction for Defendants to transfer Lot No. 32168 under Grant No. PN31947, Lot No. 32169 under Grant No. PN31948 and Lot No. 32170 under Grant No. PN39150 ("said Properties") into the name of the Plaintiff or any individual entity, corporation, agency and/or company named by Plaintiff within thirty (30) days from the date of this order; **A**
- (f) A mandatory injunction for the Defendants to transfer Property 5299 into the name of the Plaintiff or any individual entity, corporation, agency and/or company named by the Plaintiff within thirty (30) days from the date of this order; **B**
- (g) If any of the Defendants refuses, fails, ignores and/or neglects to complete the transfer as provided in paragraphs e) and f) above, an Order for the Honorable Court to exercise its discretionary power for but not limited to sign the instruments related including the memorandum of transfer for the purpose of completing the transfer of Property 3299 and the said Properties to the Plaintiff or any individual entity, corporation, agency and/or company to which the Plaintiff named; **C**
D
- (h) That the Defendants shall pay all costs of the completion of the transfer of Property 3299 and the said Properties to the Plaintiff or any individual entity, corporation, agency and/or company that the Plaintiff named; **E**
- (i) A mandatory injunction for the Defendants to transfer the entire D4 shareholding to the Plaintiff or any individual entity, corporation, agency and/or company to which named by the Plaintiff; **F**
- (j) If the Defendants refuse, fail, neglect and/or careless in transferring the Property within thirty (30) days from the date of Judgment, then this Honorable Court will sign the documents and instruments of transfer in completing the transfer of the said Properties; **F**
- (k) In the event that the transfer of the Properties is completed, the Defendants shall therefore indemnify and compensate the Plaintiff for any claim by any third party to the Property 3299 and the said Properties (if any); **G**
- (l) A declaration that D1, D2 and/or D3 jointly and/or separately had breached their fiduciary and statutory duties as members of the Plaintiff's Cooperative Board when deciding, approving and subsequently finalising the D4 Share Sale Agreement without taking into account the Plaintiff's best interests; **H**
- (m) That the Defendants jointly and/or separately shall submit and/or cause to be submitted to the Plaintiff all statements of accounts/ accounts of D4; **I**

- A** (n) A declaration that the Plaintiff has the right to track any trade and/or transactions from all accounts operated by D4 and later the sum of all D4 transactions is declared a secret profit;
- (o) That the Defendants are jointly and/or separately liable to the Plaintiff for payment of any sums calculated from any accounts/
- B** accounts of D4 or any other amount as a secret profit as may be found and/or calculated by this Honourable Court as deemed reasonable;
- (p) The Defendants shall recover and indemnify the Plaintiff against any third party claim against the Plaintiff in connection with the said Properties, D4 Share Sale Agreement and the Housing
- C** Development Project;
- (q) General Damages for the breach of fiduciary and statutory duties;
- (r) Exemplary and punitive damages;
- (s) Alternatively and in the event that the Properties are not
- D** transferable by any reason to the Plaintiff pursuant to this Judgment, the Defendants either jointly and/or separately shall return and pay to the Plaintiff a sum as follows or any amount that to be assessed by this Honorable Court:

E	Num.	Details	Total (RM)
	1.	Purchase Price Payment for D4 Shares	6,862,006.80
	2.	'Advanced Fees' for Housing Development Project	2,000,000.00
F	3.	Evaluation Fees	16,529.20
	4.	Legal Fees Payment	37,123.00
	5.	Property 3299 Purchase Price Payment	1,500,000.00
G		Grand Total	10,415,669.00

- (t) And if the Defendants refuse, fail, neglect and/or careless in complying with the above Orders, the Defendants will be deemed to have breached the Court Orders and may be subject to a committal action. And anyone who is aware of these Orders separately and/or jointly with the Defendants assists and/or permits the Defendants to violate these Orders, they too shall be deemed to have breached the Court Orders and may be subject to committal action for contempt of Court.
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- (u) Interest at the rate of 5% on amounts in paragraphs q), r) and s) that is determined by the Court from the date of judgment until full settlement;
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- (v) Costs; and
- (w) Any further relief or others that the Court deems fit and reasonable.

[6] The defendants have filed their statement in defence and whilst in my view, a detailed examination of the defence is not critical at this stage, it is still pertinent to set it out in brief. The defendants do not deny most of the background facts as pleaded by the plaintiff.

[7] They also do not deny the various purchases made in their personal names using the plaintiff's funds but deny the allegations of fraud and breach of fiduciary/statutory duty and plead that all transactions were done with the knowledge and approval of the plaintiff's Board. Strikingly, the defendants themselves admit and concede that they are trustees of the various properties purportedly purchased on behalf of the plaintiff and in fact do not object to the plaintiff's prayers in the statement of claim for such declaratory relief and injunctions and that they are prepared to retransfer the properties to the plaintiff.

[8] They however dispute the allegations of breach of fiduciary duties etc and take the view that they should not be liable to pay all the costs of the completion of the retransfer of the said properties back to the plaintiff. This is evident from para. 30 of the defence where the defendants plead as follows:

30. Merujuk kandungan perenggan 55, Defendan-Defendan menyatakan bahawa;

(i) Kesemua tuntutan Plaintiff di perenggan (a), (b), (c), (d), (e), (f), (g), (i), (j) dan (k) tidak pernah dituntut sebelum daripada ini daripada Defendan-Defendan, malahan Defendan-Defendan sendiri yang menuntut Plaintiff berbuat demikian sebelum ini, maka Defendan-Defendan tiada bantahan terhadap tuntutan ini,

(ii) Tuntutan di perenggan (h), (l), (o), (p), (q), (r), (s), (t), (u), (v) dan (w)ohon untuk ditolak dan kos dibayar kepada Defendan-Defendan kerana terpaksa memfailkan pembelaan sedangkan kesemua permohonan yang dipohon tidak memerlukan sebarang perintah Mahkamah kerana Defendan-Defendan sedia pada setiap masa membuat pindah milik dan mematuhi permintaan Plaintiff.

The Respective Submissions

[9] For the defendants, it was submitted that since the plaintiff is a registered cooperative society under the said Act and since the defendants are members and former office-bearers of the plaintiff, then, the plaintiff cannot seek redress in the civil courts unless the Commission refers the dispute to court under s. 82(3) of the said Act and this can only be achieved once the plaintiff refers such dispute to the Commission under s. 82(1) of the said Act.

A [10] The defendants in their submission rely heavily on a decision of the Federal Court in *M Arulandan v. Malaysian Co-operative Insurance Society Ltd* [1987] 1 CLJ 43; [1987] CLJ (Rep) 44; [1987] 1 MLJ 485 SC (“*Arulandan*”) to support their contention.

B [11] Conversely, the plaintiff submits that the case of *Arulandan* ought to be distinguished and that subsequent cases such as *Koperasi Serbausaha Makmur Bhd (KOSMA) v. Jamil Ninggal & Ors* [2019] 9 CLJ 600 CA (“*Koperasi Serbausaha*”), and *Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd* [2019] 1 LNS 1099; [2019] MLJU 754 HC ought to be followed whereby the plaintiff contends that on the facts of this matter and in light of the relief sought, the plaintiff’s claim ought not to be struck off as s. 82 of the said Act is not applicable.

[12] The plaintiff further contends that the Commission has no powers to provide the relief sought and as such, the plaintiff’s claim is not an abuse of the court’s process.

D **Analysis And Decision**

[13] At the outset, I am indeed mindful of the principles that guide courts when faced with an application under O. 18 r. 19 and these have been succinctly set out in the *locus classicus* decision of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC where the Supreme Court held as follows:

- (a) It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it ‘obviously unsustainable’.
- (b) It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defense.
- (c) So long as a pleading disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case or the defense was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out.
- (d) If some cause of action or defense is disclosed it cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court.

[14] Reference is also made to another decision of the Federal Court in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 FC where:

... We also make this observation on the application of the court's summary power to strike out a pleading under O. 18 r. 19 of the Rules of Court 2012 (successor to RHC 1980). Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case', can a pleading be struck out.

[15] Reverting to the application at hand, as a starting point, the case of *Arulandan* relied upon by the defendants has to be examined to consider its applicability or otherwise to the facts herein. *Arulandan*'s case was a decision of the Supreme Court which dealt with s. 49 of the Co-operatives Societies Act 1948 which is in *pari materia* with the current s. 82 of the said Act. The facts of the *Arulandan*'s case were as follows:

- (i) The appellant, Arulandan ("A") was a member and officer of the respondent who was a cooperative society and thus governed by the said Act. Upon his increments being barred pursuant to a domestic inquiry, A commenced proceedings in court seeking a declaration that the disciplinary action was null and void on several grounds;
- (ii) The respondent society applied to strike out the claim on the basis that the dispute ought to have been referred to the Registrar General under s. 49 of the 1948 Act. The said application found favour with the learned High Court Judge and A then appealed to the Supreme Court. The appeal was dismissed by a majority decision with Seah SCJ dissenting. The majority in dismissing the appeal held that the dispute as to whether the actions taken by the Chief Executive of the respondent were in contravention of the staff regulations was a domestic dispute relating to administration within the society and thus ought to be referred to the Registrar;
- (iii) In arriving at its decision, the Supreme Court in dealing with the meaning of the words 'touching the business of the society' as provided in s. 49 there (or the similar in s. 82 today), placed reliance on a 1954 decision of the Madras High Court (India) which held as follows in *Madhava Rao v. Surya Rao* AIR 1954 Mad 103 ("*Madhava Rao*"):

The words 'touching the business of a society' must be given their import, bearing in mind the object of the legislation. Taking the dictionary meaning of the word 'touching' it indicates that the dispute need not directly arise out of the business of the society, but that it is enough that it should have reference or relation to or concern the business of the society. The word 'touching' was clearly not intended to restrict the meaning of the word business; it was designed to enlarge its scope. Similarly, the word 'business' is not used in a narrow sense.

A [16] The defendant also relies on the decision of the High Court in *Thanaraj Manikam & Ors v. Lower Perak Tamil Co-operative Society* [1996] 1 LNS 129; [1997] 4 MLJ 82 (“*Thanaraj*”) where a claim by the plaintiff there against a cooperative society was dismissed on the basis that the plaintiff ought to have resorted to s. 82 of the said Act as the court held that the clear purport and intent of s. 82 is to restrict members of a cooperative society from seeking redress in a civil court in their domestic disputes.

[17] A perusal of the decision in the *Thanaraj* case will reveal that reliance was placed on the decisions of the Supreme Court of *Arulandan* and the *Madhava Rao* case.

C [18] In my considered view, in cases such as the present, it is imperative to first identify the true nature of the dispute and to then ascertain whether it is such a dispute that was envisaged to be referred to the Commission within s. 82 and if so, whether it ousts the jurisdiction of the civil courts to determine them (unless and until the Commission requires the parties to refer the dispute to court).

D [19] As set out earlier in this decision, the claims and relief sought by the plaintiff are manifold and they essentially allege breach of fiduciary and statutory duties and seek declaratory and injunctive relief. Can such claims and relief sought be considered a ‘dispute touching the business of a co-operative society’ thus invoking s. 82? The plaintiff relies on the recent decisions of the Court of Appeal in *Koperasi Serbausaha Makmur Bhd (KOSMA) v. Jamil Ninggal & Ors* [2019] 9 CLJ 600 CA and the High Court in *Bank Kerjasama Rakyat Malaysia v. Koperasi Amanah Pelaburan Bhd* [2019] 1 LNS 1099; [2019] MLJU 754 HC case and urges this court to answer the question in the negative.

[20] To reiterate, the plaintiff contends that in light of the nature of the dispute and the relief claimed, theirs is not a dispute falling within s. 82 and the defendant’s application to strike out their claim be dismissed with the necessary result that this court proceeds to hear this dispute on the merits.

G [21] In order to consider the merits of the plaintiff’s contention and bearing in mind that both the decisions of the Court of Appeal in *Koperasi Serbausaha* and the High Court in *Bank Kerjasama Rakyat* relied upon had occasion to deal, and if I may observe, deal quite extensively with s. 82 of the said Act, it behoves me to now examine the facts of those two case in detail and to distil the principles of law enunciated.

Koperasi Serbausaha Makmur Bhd (KOSMA) v. Jamil Ninggal

I [22] The facts are quite simple. The two respondents were employees at a palm oil plantation which was owned by the appellant Koperasi known as KOSMA. Their services as employees were terminated for misconduct but

they still remained as members of KOSMA. Their complaints of unfair dismissal against KOSMA were referred to the Industrial Court by the Minister of Human Resources (“MOHR”).

[23] During the trial at the Industrial Court, the respondents requested for an adjournment as they wished to refer their claims to the tribunal of the Cooperative Commission of Malaysia (the tribunal) pursuant to s. 82 of the said Act on the ground that the Industrial Court was not seized with jurisdiction. The tribunal accepted their case for adjudication and as a result, the respondents withdrew their case at the Industrial Court and this would mean that their dispute would have to be adjudicated afresh at the tribunal.

[24] KOSMA then commenced judicial review proceedings at the High Court to quash the decision of the tribunal in accepting the adjudication of the respondents’ claims. The High Court dismissed the said application for judicial review and KOSMA appealed to the Court of Appeal.

[25] The primary issue that arose for adjudication in the appeal was whether the tribunal was conferred with the requisite jurisdiction under the Act to deal with disputes relating to wrongful termination of employment or unfair dismissal. Whilst the subject matter of the dispute in that case related to unfair dismissal, nonetheless, I find the various enunciations and references by the Court of Appeal in relation to the true extent of s. 82 of the said Act helpful and instructive.

[26] The Court of Appeal in allowing KOSMA’s appeal had the opportunity to construe s. 82 of the said Act as a whole and to determine the nature of disputes the said Act purports to cover or otherwise. Whilst acknowledging that s. 82 of the said Act is clear in that its purpose is the resolution of disputes, Nallini Pathmanathan JCA (as she then was) enunciated the following:

- (i) When the employment of an employee of a co-operative society is terminated, resulting in a dispute, is the Commission conferred with the jurisdiction by the Co-operative Societies Act 1993 (‘the Act’), to determine such a dispute relating to a complaint of wrongful termination of employment?
- (ii) This turns on the construction to be accorded to s. 82(1) of the Act, more particularly the phrase “a dispute touching on the management or business” of the co-operative society, KOSMA. The precise issue requiring determination is whether the phrase “a dispute touching on the management or business” includes the settlement or adjudication of disputes relating to the wrongful termination of employment of co-operative society employees, as in the case with the respondents here.

- A (iii) The High Court, relying on the Supreme Court decision of *M Arulandan v. Malaysian Co-operative Insurance Society Ltd* [1987] 1 CLJ 43; [1987] CLJ (Rep) 44; [1987] 1 MLJ 485 ('*Arulandan*'), held that the 'dispute', namely the complaints of wrongful termination by the respondents, fell within the ambit of the phrase "a dispute touching on the management or business". The effect of the High Court's decision was to find that the third respondent is clothed with jurisdiction to determine or adjudicate upon claims of wrongful termination of employment by officers and/or employees of KOSMA. Accordingly KOSMA's judicial review application, which was premised on the contention that the Commission had no such jurisdiction or power, failed. The dispute was to be determined by a tribunal set up pursuant to a recommendation by the Commission to the Minister under s. 83 of the Act;
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- D (iv) We determined and held otherwise, namely that the complaints of wrongful termination or unfair dismissal of employment of the respondents do not fall within the purview of the phrase "dispute touching on the management or business" of the co-operative society. The net result of our decision was to hold that the Commission did not possess jurisdiction over disputes of this nature. It was not therefore empowered to either deal with the dispute itself, or to refer the dispute to the tribunal established under s. 83(1) of the Act to resolve or adjudicate upon the dispute.
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- F (v) We reached this decision for a few reasons. First, we concluded that the facts of the present case are distinguishable from *Arulandan* because in that case, the employee lodged a grievance in respect of disciplinary action taken against him by the co-operative society. However, his employment was never terminated and he remained at all times an officer of the cooperative society/company. He only sought relief against disciplinary action. To that extent, the case was distinguishable.
- G (vi) We were further persuaded by the fact that *Arulandan* was decided (particularly in relation to the interpretation to be accorded to the phrase "dispute touching on the management or business") by reliance on the Madras High Court decision of *Madhava Rao v. & Surya Rao* AIR [1954] Mad 103 ("*Madhava Rao*"). In that case, the Indian equivalent provision of our s. 82(1)(c), (in *pari materia* with our provision) was accorded a wide or broad construction. Adopting the same approach, the Supreme Court led by Wan Suleiman SCJ, determined by a majority, that the phrase was to be broadly construed. George Seah SCJ dissented.
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- I (vii) It was held that the dispute relating to whether the disciplinary procedures implemented by the Chief Executive amounted to a contravention of the relevant co-operative regulations, was a domestic dispute. It related to the internal administration of the

co-operative society. The phrase “dispute touching the business of a registered society” was therefore wide enough to accommodate such a dispute, and it should be referred to the then Registrar General of Co-operative Societies under the then s. 49(1) of the Cooperative Societies Act 1948.

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- (viii) It is clear that in *Arulandan*, the dispute related to domestic or internal disciplinary proceedings. Arulandan's grievance was against the imposition of the proceedings and the punishment meted out. But Arulandan did not leave the employ of the co-operative society. He remained an officer, even after the disciplinary proceedings. To that extent, it is clear that his grievance with regards to his employment remained an internal matter of the cooperative society. The adoption of a 'broad' approach in the construction of the words “touching ... the management or business” of a co-operative society to encompass a domestic disciplinary proceeding is, with great respect, entirely correct.

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- (ix) Another relevant point worth mention is that the Indian High Court case of *Madhava Rao* which prescribed that a broad construction be accorded to the phrase “touching the business of a registered society” had in fact been overruled by the Indian Courts in the case of *Co-operative Central Bank Ltd & Ors v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad* [1970] AIR 245 ('Co-operative Central Bank'). In *Co-operative Central Bank*, the learned judges relied in turn upon an Indian Supreme Court decision namely *Deccan Merchants Co-operative Bank Ltd v. M/s Dalichand Jugraj Jain and Ors* [1969] AIR ('Deccan Merchants') where the Supreme Court of India determined that a narrow construction or definition was to be accorded to the phrase “touching on the business”.

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- (x) The word 'dispute' it was reasoned, was subject to a limitation, namely, to disputes capable of being resolved by the Registrar. As the dispute in question in *Deccan Merchants* was between a landlord and tenant, it was doubtful that the word 'dispute' in the equivalent Indian legislation relating to co-operatives, encompassed such a matter. There was specific legislation to deal with a landlord and tenant dispute.

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- (xi) In like manner, we were of the view that in Malaysia, the Industrial Relations Act 1967 provides specific legislation dealing with disputes pertaining to unfair dismissal. To that extent, we were of the view, with the greatest of respect, that the phrase “touching on the business” and “dispute” in s. 82(1)(e) ought to be accorded a narrow construction or definition, as it did not appear to be within the contemplation of the Legislature to confer jurisdiction on the third respondent to adjudicate upon, and grant reliefs such as reinstatement or arrears of wages, in respect of grievances of unfair dismissal. This more properly fell within the regime of the Industrial Relations Act 1967.

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- A (xii) We therefore allowed KOSMA's appeal, set aside the decision of the High Court and allowed the application for judicial review. The net consequence of our decision is that the Commission's decision to refer the respondents' dispute to such a tribunal is quashed. The Commission acted *ultra vires* or in excess of its jurisdiction in making such a reference because it was not, on our construction of
- B s. 82(1)(c), conferred by Parliament with the jurisdiction to refer a dispute relating to wrongful dismissal of officers of a co-operative society to a tribunal for adjudication. Such a dispute is not a domestic or internal matter of the co-operative.

C [27] From the above, it is clear that the Court of Appeal distinguished the facts of *Arulandan*'s case as he was not dismissed and remained an employee and as such was indeed an internal matter of the co-operative society.

D [28] It was also pertinent to note that the Court of Appeal had observed that the very same case of *Madhava Rao* relied upon by the Federal Court in *Arulandan* which prescribed a broad construction to the phrase "touching the business of the society" had been subsequently overruled by the Indian Supreme Court where they had determined that a narrow construction or definition was to be accorded to the phrase "touching on the business".

Bank Kerjasama Rakyat v. Koperasi Amanah Pelaburan Bhd

E [29] It is quite fortunate that quite soon after the decision of the Court of Appeal above, another opportunity arose for the High Court to examine the true scope of s. 82. This case relates to a dispute on registered trademarks but I find the pronouncements by Wong Kian Kheong J, there too compelling.

F [30] In this case, both parties were cooperative societies registered under the Co-operative Societies Act 1993. The plaintiff was the proprietor of four trademarks and was claiming *vide* its civil action that the defendant had infringed their trademarks and passed off the defendants services etc as those of the plaintiffs.

G [31] Strangely, only after completion of the trial did the defendant raise the issue of the High Court's jurisdiction to hear the action whereby the defendant contended that the plaintiff ought to have resorted to s. 82 of the said Act. As such, the following issues arose before His Lordship in that case which he set out as follows:

H [4] The following questions arise in this case:

- (1) whether it was appropriate for the Defendant to object to the court's jurisdiction to hear this action under s. 82(1)(d), (3)(c), (5) and (7) CSA only after the completion of the trial of this case;

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- (2) in view of s. 82(1)(d), (3)(c), (5) and (7) CSA, does this court only have jurisdiction to decide this case when: A
- (a) the dispute between the Plaintiff and Defendant is referred by the Plaintiff or Defendant to Malaysia Co-operative Societies Commission (MCSC) under s. 82(1)(d) CSA ; and
- (b) when MCSC requires the Plaintiff and Defendant to refer the dispute to court pursuant to s 82(3)(c) CSA?; B
- (3) if s. 82(1)(d), (3)(c), (5) and (7) CSA ousts the court's jurisdiction to hear This Action when MSCS does not refer this case to court, whether s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the basic structure of the Federal Constitution (Constitution) regarding the court's judicial power to decide disputes under Article 121(1) of the Constitution; C
- (4) if s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the Constitution's basic structure regarding the court's judicial power to adjudicate disputes pursuant to Article 121(1) of the Constitution, is s. 82(1)(d), (3)(c), (5) and (7) CSA invalid under Article 4(1) of the Constitution to the extent of such an alteration?; and D
- (5) if the court has jurisdiction to hear this action without any reference by MCSC
- (a) whether the Defendant has infringed 4 RTM's under s. 38(1)(a) TMA. In this regard, can the Defendant rely on a defence under s. 40(1)(dd) TMA that the Plaintiff has consented, expressly or impliedly, to the Defendant's use of the 4 RTM's?; and E
- (b) has the Defendant committed a tort of passing off the Defendant's services, products and business as those of the Plaintiff's? If the Defendant has passed off its services, products and business as those of the Plaintiff's, whether the Plaintiff is estopped from claiming from the Defendant based on the tort of passing off because of the Plaintiff's conduct and/or representations. F
- [32]** For the purposes of my decision herein, issues 1 and 5 above are not applicable but I indeed find valuable guidance from His Lordships elucidation on the jurisdiction of the courts in matters and disputes relating to cooperative societies. After referring to s. 82 and extensively to the decision of Nallini Pathmanathan JCA (as she then was) (now FCJ) in *Koperasi Serbausaha*, His Lordship held that the defendants were not obliged under s. 82 of the said Act to refer a dispute concerning trade mark infringement and a tort of passing off to the Commission as the Commission had no capability to decide the two causes of action. His Lordship also relied on the Court of Appeal decision of *On Bin Long & Ors v. Romeli Dollah* [2014] 7 CLJ 371 where the Court of Appeal had similarly held that the Cooperative Commissioner is not clothed with any jurisdiction to deal with the tortious claim for defamation. G
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A [33] However, the decision did not appear to just rest on the applicability of s. 82 depending on the nature of the dispute or the claim. It is to be highlighted that Wong Kian Kheong J also set out the interesting issue on the validity of s. 82 *vis a vis* did it alter the Federal Constitution's basic structure regarding the court's judicial power to adjudicate disputes pursuant to art. 121 of the Federal Constitution.

B [34] I do not propose to regurgitate His Lordships in-depth discussion of the various articles in the Federal Constitution nor the various decisions of the Federal Court but suffice for me at this juncture to state his final views which were enunciated at para. [36] of the judgment as follows:

C [36] Based on *Sivarasa*, *Semenyih Jaya* and *Indira Gandhi*, if s. 82(1)(d), (3)(c), (5) and (7) CSA has the effect that the court can only have jurisdiction to hear This Action when MSCS requires the Plaintiff and Defendant to refer this case to the court, I am of the following view:

D (1) s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under Article 121(1) of the Constitution by encroaching into the domain of the court's judicial power (Encroachment); and

E (2) s. 82(1)(d), (3)(c), (5) and (7) CSA is invalid under Article 4(1) of the Constitution to the extent of the Encroachment. Accordingly, by reason of the Basic Structure Doctrine which includes the court's judicial power, the court has jurisdiction to hear This Action even though

F (a) neither the Plaintiff nor Defendant has referred this case to MCSC pursuant to s 82(1)(d) CSA; and

(b) MCSC does not require the Plaintiff and Defendant to refer this dispute to court in accordance with s. 82(3)(c) CSA and such a decision by MCSC is purportedly final under s. 82(5) and (7) CSA.

G [35] Having had the benefit of reading the said judgment and the discussion, I am of the same view that the civil court surely cannot only have jurisdiction to hear a matter concerning a cooperative society only once the Commission requires the parties concerned to refer the dispute to court.

H [36] Back to the facts of the case at hand. Based on the facts of this case and in particular, the nature of the plaintiff's claim and their various causes of action, and applying the principles as set out in the *Koperasi Serbausaha* and *Bank Kerjasama Rakyat* cases, I have no hesitation in dismissing the defendants' application to strike out the plaintiff's claim.

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[37] I am of the considered view that the facts of the present case are distinguishable from *Arulandan*, as the reliefs sought herein do not relate to a disciplinary action against an employee. Further, bearing in mind that the causes of action relate to breach of fiduciary/statutory duty, such claims cannot be considered a dispute touching on the management or business of the plaintiff.

[38] Further, in relation to the specific prayers sought by the plaintiff in the action, I also agree with the plaintiff that with reference to the powers and functions expressly set out in s. 23 of the said Act, the Commission has no power/ jurisdiction to grant such injunctive relief or award damages etc.

[39] In the upshot, encl. 7 is dismissed with costs of RM8,000 (subject to 4% allocatur) to be paid by the defendants to the plaintiff. The trial dates of 4 and 5 February 2020 are maintained whereby this court will hear this dispute on the merits.

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